

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1486

To be argued by
GREGORY L. DISKANT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1486

UNITED STATES OF AMERICA,

Appellee.

—v.—

VIN JO PARADIS

Defendant-Appellant.

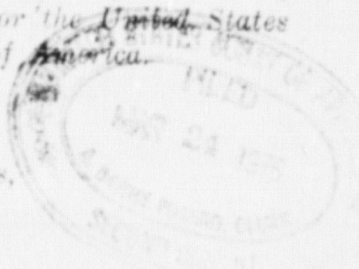
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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COUNTY OF NEW YORK) ss.:

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**United States Court of Appeals
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Docket No. 77-1486

UNITED STATES OF AMERICA,

Appellee,

—v.—

VINICIO PARADIS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vinicio Paradis appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 7, 1977, after a three day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 77 Cr. 561, filed on July 28, 1977, charged Vinicio Paradis, in Count One, with conspiracy to possess and sell counterfeit currency in violation of Title 18, United States Code, Section 371, in Count Four with possession of \$215 in counterfeit currency in violation of Title 18, United States Code, Section 472, and in Count Five with possession and sale of \$14,000 in counterfeit

currency in violation of Title 18, United States Code, Sections 2 and 472.*

Trial began before Judge Cannella and a jury on November 1, 1977. On November 4, 1977, after a day of deliberations, the jury acquitted Paradis on Count One, the conspiracy count, and convicted him on Counts Four and Five.

On December 7, 1977, Judge Cannella suspended imposition of sentence and placed Paradis on two years probation.

Statement of Facts

A. The Government's Case

In May, 1977 Special Agent Marino Radillo of the United States Secret Service, acting in an undercover capacity, met a man known to him as "Roberto," with whom he had discussions concerning the purchase of counterfeit money. Roberto was later identified as Jacinto Vasquez. (Tr. 19, 25).**

*Co-defendant Jacinto Vasquez, a/k/a "Roberto", was charged, in Counts Two and Three, with two additional sales of counterfeit currency in violation of Title 18, United States Code, Section 472, and, in Count Six, with carrying a firearm during the commission of a felony, in violation of Title 18, United States Code, Section 924(c)(2). On October 7, 1977, Vasquez pleaded guilty to Count Five of the indictment, involving the \$14,000 sale. On November 15, 1977, Vasquez was sentenced by Judge Cannella to two years incarceration. He is presently serving his sentence.

A redacted version of the indictment, omitting the three counts naming only Vasquez, was sent to the jury in the instant case.

** The designation "Tr." refers to the trial transcript; the designation "GX" refers to Government exhibits introduced at trial.

On May 31, 1977, Agent Radillo, together with Special Agent Raphael Calzada, who was also acting undercover, met with Roberto in the Bronx. Roberto, who was driving a blue Toyota, told Agents Radillo and Calzada that he had approximately \$7,000 in counterfeit five dollar Federal Reserve Notes for sale, and that he hoped to obtain additional counterfeit currency within the next few days. Agent Radillo promised to buy the \$7,000 and whatever additional counterfeit currency Roberto could obtain. Agent Radillo arranged to call Roberto the following day. (Tr. 20-24, 39-41).

The following day, June 1, 1977, Agent Radillo telephoned Roberto, as had been arranged. The telephone call was recorded. (GX 1, 2). Roberto said he had not yet obtained the additional counterfeit currency, but that he would get it that evening. Agent Radillo promised to pay 27.5 percent of the face value of the counterfeit currency. He agreed to call Roberto again the next day. (Tr. 25-29).

On the morning of June 2, 1977, Agent Radillo telephoned Roberto, again recording the conversation. (GX 1, 3). Roberto said that he now had \$14,000 in counterfeit five dollar bills available for sale. Agent Radillo arranged to meet with Roberto that afternoon at a Korvette's parking lot in the Bronx to effect the sale. (Tr. 26-29).

On the afternoon of June 2, 1977, surveillance agents of the Secret Service staked out the prearranged meeting spot at the Korvette's parking lot. When they arrived they observed that Roberto was already there, standing by his blue Toyota. The hood was up and he appeared to be working on the engine. Soon thereafter the surveillance agents observed, for the first time, appellant Vinicio Paradis. They saw Paradis walk up to Roberto. After engaging in conversation, Paradis walked away to an-

other vehicle, a green Ford which was parked some distance from the Toyota and which the agents had not previously noticed. Paradis returned to the Toyota carrying tools. (Tr. 56-57, 61-64).

Thereafter, Agents Radillo and Calzada drove into the parking lot in an unmarked car. They parked their car about one hundred feet from the blue Toyota and walked over to Roberto and appellant Paradis. Agent Radillo asked Roberto who Paradis was; Roberto replied that Paradis was his uncle. Thereafter, Roberto and Agent Radillo walked over to the green Ford, from which Paradis had previously removed the tools and in which the \$14,000 in counterfeit bills was stored. Paradis and Agent Calzada remained at the blue Toyota. (Tr. 29-32, 41-44).

As they walked to the green Ford, Agent Radillo asked Roberto why he had brought the counterfeit in a different car. Roberto said, "You don't think I'm going to bring it in my car." At the green Ford, Roberto climbed into the front seat and Agent Radillo got into the back seat, leaving the door open. On the floor of the back seat was a plastic bag in which was a box containing \$14,000 in counterfeit five dollar Federal Reserve Notes. Agent Radillo examined the counterfeit currency. (Tr. 32-34, 44-45, 57, 65).

Back at the blue Toyota, Agent Calzada and appellant Paradis could see Agent Radillo examining the package of money through the open door. Paradis said to Agent Calzada, "Look at those two guys dealing with that stuff with the doors opened. Somebody can see them." Agent Calzada said he would tell them to close the doors, and he walked over to the green Ford, where he spoke with Agent Radillo. Moments later Agent Calzada gave a prearranged signal to the surveillance agents, and Roberto and Paradis were arrested. The agents simulated the arrest of Agent Radillo as well. (Tr. 33-35, 45-47).

Appellant Paradis was searched incident to his arrest. In one pocket he had \$210 in counterfeit five dollar bills. He had a torn counterfeit five dollar bill in his wallet. There was no genuine currency in the pocket with the counterfeit bills or in his wallet. In another pocket Paradis had a quantity of genuine one dollar bills. There were no counterfeit bills in the pocket with the genuine currency. The counterfeit bills in Paradis' possession were found, upon expert examination, to be made from the same plates as the \$14,000 in counterfeit bills in the green Ford. (Tr. 66, 74).

B. The Defense Case

Appellant Paradis testified in his own defense. He testified that he had recently met Roberto and that he was with him on June 2, 1977 in order to sell Roberto his car, the green Ford, for \$500. Paradis said he went to Roberto's home on the morning of June 2, but that Roberto was unable to pay him at that time. Roberto said he could pay later, when someone would pay him some money. Paradis claimed Roberto did not tell him who would pay him the money, or why. (Tr. 93-95).

Paradis said that while he was in Roberto's apartment the telephone rang and that, after speaking on the telephone, Roberto said he could not pay Paradis until that afternoon. Paradis claimed that Roberto promised to pay him \$25 for waiting around, in addition to the \$500 for the car. Paradis said he demanded some money right away, whereupon Roberto looked around the apartment and found \$215, which he gave to Paradis. This was the money later found in Paradis' pocket and wallet. Paradis claimed he kept the \$215 separate from his own money because he would have to pay it back to Roberto if the sale of the car was not accomplished. (Tr. 95-99).

At around one o'clock, according to Paradis, Roberto asked him to accompany him to Korvette's to complete the

deal about which Roberto had spoken. Paradis said that although they left together, he and Roberto travelled in separate cars. On the way to Korvette's, according to Paradis, he stopped at an intersection, at which point Roberto pulled up and asked Paradis to carry in his car a plastic bag. The bag turned out to contain the \$14,000 in counterfeit currency, but Paradis claimed he did not know the contents of the plastic bag. (Tr. 99-100, 103).

At Korvette's Roberto instructed Paradis to park far away from the store. Thereafter, Paradis saw the undercover agents arrive. Paradis admitted that Roberto introduced him as his uncle, which was not true, but said that although he was surprised, he said nothing. Then, when Agent Radillo and Roberto were in Paradis' car looking at the money, Paradis claimed he said to Agent Calzada, "What are they doing talking in my car?" He denied saying "Look at those two guys dealing with that stuff with the doors opened." (Tr. 100-03).

Although Paradis denied knowing that the \$215 in his possession was counterfeit and that Roberto was selling counterfeit currency, he conceded that at the time of his arrest he had told Agent Calzada that he was aware of both of these facts. He explained these statements, which he said were false, by stating that he thought he could keep Roberto out of trouble by telling the agents that he knew the \$215 was counterfeit and that, therefore, Roberto had not cheated him. (Tr. 105-07). He said that by the time he was interviewed by an Assistant United States Attorney, after processing by the Secret Service, he realized the seriousness of his position and he repudiated his earlier statements to the agents. Paradis testified that his statements to the agents were lies and that, in fact, he did not know the money was counterfeit. (Tr. 107-09).

On cross-examination, Paradis admitted that he was sitting in the same room as Roberto when Roberto con-

ducted the second telephone conversation with Agent Radillo, completing the arrangements for the sale of the \$14,000. (Tr. 113). Paradis admitted telling Agent Calzada not only that he knew the \$215 was counterfeit, but that, in giving the money to him, Roberto had said, "Take it. It will pass like peanuts." Paradis further conceded telling Agent Calzada that Roberto had promised to give Paradis real money after the deal. Paradis claimed that he had invented this conversation as well in order to help Roberto. (Tr. 114-15, 130-31).

Paradis conceded that he had not had an opportunity to speak with Roberto before being interviewed by Agent Calzada but that he and Roberto had sat together in the hallway of the United States Attorney's Office before he was interviewed by the prosecutor and repudiated his earlier confession. (Tr. 117-19).

Paradis also admitted that two years earlier he had carried a photocopy of a driver's license in the name of Carlos Arias when his license was suspended and that, when stopped for a traffic violation, he presented the photocopy as his own licence and lied to the police officer about his identity. Paradis admitted that he told the truth to the officer only when it became clear that the officer would find it out anyway. (Tr. 131-35; 140-42).

The defense presented no other witnesses.

C. The *In Camera* Proceeding

Although Paradis was charged in connection with only one sale of counterfeit currency, the Secret Service agents had, on several prior occasions, purchased counterfeit currency from Jacinto Vasquez, a/k/a "Roberto." The Government instructed the agents not to mention these prior sales in their testimony in order not to unfairly prejudice appellant Paradis (Tr. 3) and no mention of those sales was made by any Government witness in his direct testimony.

Agent Radillo wrote a report with respect to one of those prior sales.* The Government determined that the report was not producible under 18 U.S.C. § 3500. Pursuant to 18 U.S.C. § 3500(c), the Government sought an *in camera* ruling from Judge Cannella on the correctness of its determination. Judge Cannella sustained the Government's position and sealed the report to preserve it for appellate review. (Tr. 3-4, 10).

A R G U M E N T

The District Court Correctly Concluded That Agent Radillo's Report Was Not Producible Under 18 U.S.C. § 3500.

The Jencks Act requires that, after a Government witness has completed his testimony, the Government turn over to the defense all statements of the witness which are "relate[d] to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). As noted, the Government determined that a particular report made by Agent Radillo relating to a prior purchase of counterfeit currency from Jacinto Vasquez, a/k/a "Roberto," was not producible under Section 3500(b), and it sought an *in camera* ruling on the question from Judge Cannella. This procedure is contemplated by the statute, 18 U.S.C. § 3500(c), and is favored by this Court. *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). Judge Cannella sustained the Government's position that the report was not Jencks material. Paradis asks this Court to review that determination.

* This is revealed in the Government's affidavit filed in this Court in opposition to appellant Paradis' motion to unseal the report. Affidavit of Assistant United States Attorney Gregory L. Diskant, February 28, 1978, at 2.

The report is clearly outside the scope of Section 3500(b). Agent Radillo testified about only one sale of counterfeit money (on June 2, 1977), about only one meeting with appellant Paradis (also on June 2, 1977), and about only two meetings with co-defendant Vasquez (on May 31 and June 2, 1977). The sealed report does not relate or refer to any of those events, and so is not producible under Section 3500(b).*

Moreover, even if the question were close—which it is not—it would still be one for the District Court to resolve. Producibility under Section 3500 is a matter “within the good sense and experience of the district judge . . . subject to the appropriately limited review of the appellate courts.” *Palermo v. United States*, 360 U.S. 343, 353 (1959) (footnote omitted). The “appropriately limited review” of which the Supreme Court spoke in *Palermo* has been held to be a review only for abuse of discretion, *United States v. Augenblick*, 393 U.S. 348, 355 (1969); *United States v. Pacelli*, *supra*, 491 F.2d at 1118, and for “clear error” in the factual finding of producibility *vel non*. *Campbell v. United States*, 373 U.S. 487, 493 (1963); *United States v. Sten*, 342 F.2d 491, 494 (2d Cir.), *cert. denied*, 382 U.S. 854 (1965); *United States v. Cardillo*, 316 F.2d 606, 616 (2d Cir.), *cert. denied*, 375 U.S. 882 (1963).

A review of the sealed material will confirm that the District Court's ruling was entirely correct. The sealed report was outside the scope of Section 3500. Moreover, it contained nothing of impeachment value. Therefore it cannot be argued that there was a “significant chance that . . . , developed by skilled counsel . . . , [it] could have induced a reasonable doubt in the minds of enough

* In fact, if the Government had sought to introduce testimony relating to the events narrated in the report, the trial court could properly have excluded such testimony as irrelevant to the issues at trial. Rule 401, Fed. R. Evid.

jurors to avoid a conviction." *United States v. Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), quoting *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969), and cases cited. See also *United States v. Hilton*, 521 F.2d 164, 166 (2d Cir. 1975), *cert. denied*, 425 U.S. 939 (1976).

This conclusion is inescapable from the fact that the defense essentially conceded the credibility of all the Government witnesses, with the exception of Agent Calzada, who the defense argued was simply mistaken. (Tr. 174-76).^{*} Thus, the entire cross-examination of Agent Radillo took less than one page of transcript and consisted only of asking him to identify a report of the events of June 2, 1977 made by Agent Calzada and to confirm that he had discussed the events narrated therein with Agent Calzada before the report was written. (Tr. 35-36). Instead of contesting the events observed by the Government witnesses (except for Agent Calzada), the defense was premised on putting a benign interpretation upon those events. For this reason, there was no purpose to be served, nor benefits to be gained, by attempting to impeach Agent Radillo, even if the sealed report related in any way to his testimony.

^{*} The defense argued that Agent Calzada had mistakenly reported the statements made by Paradis in observing Roberto and Agent Radillo examine the counterfeit currency. Beyond that argument, the defense did not contest the credibility of Agent Calzada either. (Tr. 174-76).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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